

**REDACTED – FOR PUBLIC INSPECTION**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of CenturyLink for Forbearance	)	
Pursuant to 47 U.S.C. § 160(c) from	)	WC Docket No. 12-60
Dominant Carrier and Certain <i>Computer</i>	)	
<i>Inquiry</i> Requirements on Enterprise	)	
Broadband Services	)	

**OPPOSITION OF TW TELECOM INC.**

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**OPPOSITION OF TW TELECOM INC.**

Pursuant to the Wireline Competition Bureau’s March 22, 2012 *Public Notice*,<sup>1</sup> tw telecom inc. (“tw telecom”), through its undersigned counsel, hereby submits this opposition to CenturyLink’s petition for forbearance in the above-captioned proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY.**

In its petition, CenturyLink seeks forbearance under Section 10 of the Act<sup>3</sup> from dominant carrier regulation of its “(1) existing non-TDM-based packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) existing non-TDM-based optical transmission services”<sup>4</sup> in the legacy CenturyTel and legacy Embarq territories.<sup>5</sup> Section 10

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<sup>1</sup> See generally *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, Public Notice, DA 12-451, WC Dkt. No. 12-60 (rel. Mar. 22, 2012) (“*Public Notice*”).

<sup>2</sup> See generally *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Dkt. No. 12-60 (filed Feb. 23, 2012), as amended Mar. 21, 2012 (“*CenturyLink Petition*”).

<sup>3</sup> 47 U.S.C. § 160. The Communications Act of 1934, 47 U.S.C. §§ 151 et seq. (the “Act”), was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 46 (1996).

<sup>4</sup> CenturyLink Petition at 8. CenturyLink does not specify that its request for forbearance from dominant carrier regulation excludes interexchange services. However, incumbent LECs’ in-

requires the FCC to “forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service” if the following three-part test is met:

- (1) enforcement of the identified provision(s) or regulation(s) is not necessary to ensure that the telecommunications carrier’s charges, practices, classifications or regulations are just, reasonable, and not unjustly or unreasonably discriminatory;
- (2) enforcement of the identified provision(s) or regulation(s) is not necessary to protect consumers; and
- (3) non-enforcement of the identified provision(s) or regulation(s) is consistent with the public interest.<sup>6</sup>

Under Section 10(b), when determining whether forbearance is in the public interest under Section 10(a)(3), “the Commission shall consider whether forbearance . . . will promote competitive market conditions.”<sup>7</sup>

In evaluating CenturyLink’s petition for forbearance under Section 10, the Commission should utilize the “traditional market power framework” it employed in the *Phoenix Order*. The Commission has repeatedly used that framework to assess whether there is adequate competition to forbear from applying dominant carrier regulations. And, as discussed in Part II below, the Commission can use that framework to evaluate petitions for forbearance from dominant carrier

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region, interstate interexchange services are already subject to nondominant carrier regulation. *See generally Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, Second Report and Order in CC Docket No. 06-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15756 (1997). Accordingly, for ease of reference, tw telecom refers to the services for which CenturyLink seeks forbearance as “non-TDM-based special access services.”

<sup>5</sup> CenturyLink Petition at 8.

<sup>6</sup> 47 U.S.C. §§ 160(a)(1)-(3).

<sup>7</sup> *Id.* § 160(b).

regulation of legacy services as well as advanced services such as non-TDM-based special access services.

The Commission has held that in a Section 10 forbearance proceeding, “the petitioner bears the burden of proof – that is, of providing convincing analysis and evidence to support its petition.”<sup>8</sup> Here, under the traditional market power framework (or any other reasonable standard), CenturyLink has failed to meet that burden. As discussed in Part III below, CenturyLink has not shown that there is sufficient actual and potential competition from facilities-based service providers in the retail and wholesale markets for non-TDM-based special access services in the legacy CenturyTel or legacy Embarq territories to prevent it from raising prices, discriminating unreasonably, or harming consumers. Accordingly, CenturyLink’s request for forbearance must be denied.

## **II. THE COMMISSION SHOULD EVALUATE CENTURYLINK’S FORBEARANCE PETITION USING THE TRADITIONAL MARKET POWER FRAMEWORK EMPLOYED IN THE *PHOENIX ORDER*.**

In evaluating a petition for forbearance from dominant carrier regulation under Section 10, the Commission should utilize the traditional market power framework that it “return[ed] to” in the *Phoenix Order*.<sup>9</sup> The Commission has consistently and appropriately utilized that “rigorous” analytical framework to determine whether there is sufficient competition to refrain from applying dominant carrier regulations.<sup>10</sup> Indeed, “the Commission’s market power analysis

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<sup>8</sup> See *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, ¶¶ 20-21 (2009).

<sup>9</sup> See *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶¶ 21, 37 (2010) (“*Phoenix Order*”).

<sup>10</sup> See, e.g., Final Answer Brief of Respondents, *Qwest Corp. v. FCC*, No. 10-9543, at 16-17 (10th Cir. Mar. 18, 2011) (stating that the Commission’s “rigorous market power framework . . .

was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, . . . which is the precise inquiry specified in [S]ection 10(a)(1).”<sup>11</sup> In the *Phoenix Order*, under the traditional market power framework, the Commission, among other things, (1) used “economically sound standards”<sup>12</sup> to define the relevant product markets—including separate retail and wholesale markets<sup>13</sup>—as well as the relevant geographic markets;<sup>14</sup> (2) identified the market participants and evaluated the level of actual competition, limiting its analysis to competition from service providers that use their own facilities (e.g., loop and transport facilities) to deliver service to their customers;<sup>15</sup> and (3) took into account the relevant barriers to entry and “evaluate[d] whether potential entry could occur in a timely, likely and sufficient manner to counteract the exercise of market power by [the petitioner].”<sup>16</sup>

In the *Phoenix Order*, the Commission noted that “a different analysis [from the traditional market power analysis] *may* apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities.”<sup>17</sup> There is,

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underpinned its earliest forbearance decisions”); FCC Intervenor’s Uncited Preliminary Answer Brief, *Qwest v. FCC*, No. 10-9543, at 13 & n.7 (10th Cir. Jan. 31, 2011).

<sup>11</sup> *Phoenix Order* ¶ 37.

<sup>12</sup> *Id.* n.169.

<sup>13</sup> *Id.* ¶ 46.

<sup>14</sup> *Id.* ¶¶ 64-65.

<sup>15</sup> See, e.g., *id.* ¶ 71 (counting as competitors in the wholesale loop market those service providers that have “constructed their own last-mile connections to enterprise customers and . . . offer these services to competitors as wholesale inputs”).

<sup>16</sup> *Id.* ¶ 42.

<sup>17</sup> *Id.* ¶ 39 (emphasis added).

however, no reason for the Commission to depart from the traditional market power framework when evaluating CenturyLink’s petition. The Commission’s primary concern with employing that framework in the context of advanced services appears to be that market shares in an industry characterized by innovation and changing technology may not be ““meaningful predictors of future competitive conditions.””<sup>18</sup> But the same fiber facilities that can be used to provide the legacy switched access services at issue in the *Phoenix Order* are used to provide the non-TDM-based special access services at issue in CenturyLink’s petition. Thus, an examination of actual facilities-based competition and the potential for facilities-based competitive entry similar to that conducted in the *Phoenix Order* should yield reliable results.

Moreover, as the Commission stated in the *Phoenix Order*, it must “take into consideration the direction of section 706” of the Act<sup>19</sup> when evaluating the competitiveness of advanced services. However, CenturyLink’s broad and unsupported statement that “lingering dominant carrier regulation prevents [it] from entering into simple, customized arrangements that wireless providers seek” is insufficient to demonstrate that forbearance will further wireless broadband deployment, and in turn, the goals of Section 706.<sup>20</sup>

**III. UNDER THE TRADITIONAL MARKET POWER FRAMEWORK (OR ANY OTHER REASONABLE STANDARD), CENTURYLINK HAS FAILED TO DEMONSTRATE THAT THERE IS SUFFICIENT COMPETITION IN THE RELEVANT MARKETS TO JUSTIFY FORBEARANCE.**

Applying the traditional market power framework (or any other reasonable standard), it is clear that CenturyLink’s petition must be denied. This is so for a number of reasons. *First*,

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<sup>18</sup> See *id.* n.132 (quoting Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 14-15 (2007)).

<sup>19</sup> *Id.* ¶ 39.

<sup>20</sup> CenturyLink Petition at 40.

CenturyLink has failed to demonstrate that there is sufficient competition *in the relevant product markets* to justify forbearance from dominant carrier regulation of its non-TDM-based special access services. For example, it is not clear whether the market share reports relied upon by CenturyLink include revenues from services other than non-TDM-based special access services, such as long-haul services.<sup>21</sup> This is significant because, according to these reports, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]<sup>22</sup> In addition, CenturyLink does not provide evidence of sufficient competition in the *wholesale* market for non-TDM-based special access services. For instance, while CenturyLink claims that it competes with “at least 30 providers offer[ing] enterprise broadband services” in the United States,<sup>23</sup> CenturyLink does not address the extent to which each of these providers offers non-TDM-based special access services at wholesale.

*Second*, CenturyLink has failed to demonstrate that sufficient competition exists *in the relevant geographic markets*. Most, if not all, of the market share information provided by CenturyLink is nationwide market share data.<sup>24</sup> As such, the data has no bearing on whether CenturyLink faces sufficient competition in the legacy CenturyTel and legacy Embarq territory to warrant relief from dominant carrier regulation of the non-TDM-based special access services at issue in those territories. CenturyLink also relies on evidence of purported competition in geographic markets other than those for which it seeks forbearance. For example, CenturyLink

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<sup>21</sup> See *id.* at 25 & nn.75-76.

<sup>22</sup> See *id.*, Attachment H at 34 & Attachment I at 27.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> See *id.* at 24-26; see also *id.* at 16 (claiming that CenturyLink “is just one of numerous national providers, and holds a small fraction of the market for these services”).



proffers that “*Qwest* has faced substantial competition in responding to . . . RFPs [for high-capacity backhaul services]”<sup>25</sup> and that Integra provides Ethernet-over-copper in legacy *Qwest* markets such as “Phoenix, Minneapolis, Seattle, Denver, and Portland.”<sup>26</sup> Similarly, CenturyLink points to competition from at least 30 service providers, including Edison Carrier Solutions, Frontier, Masergy, and NTT America, but CenturyLink has not shown that these carriers are significant providers of non-TDM-based special access services in the legacy CenturyTel and legacy Embarras territories.<sup>27</sup>

*Third*, much of the evidence provided by CenturyLink in support of its petition is not evidence of *facilities-based* competition. For instance, CenturyLink points to competition from ““systems integrators, equipment vendors, and value-added resellers,””<sup>28</sup> but none of these types of providers offers Ethernet and other non-TDM-based special access services over its own facilities. CenturyLink also fails to specify whether the market share data upon which it relies includes only facilities-based competitors.<sup>29</sup> Nor does CenturyLink discuss the extent to which each of the approximately 30 service providers listed in Attachment E to its petition<sup>30</sup> provides non-TDM-based special access services over its own facilities.

*Fourth*, CenturyLink overstates the potential for competitive entry into the non-TDM-based special access services market. For example, CenturyLink claims that competitors have

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<sup>25</sup> *Id.* at 27 (emphasis added).

<sup>26</sup> *Id.* at 24.

<sup>27</sup> *See id.*, Attachment E, at 4-7.

<sup>28</sup> *Id.* at 20-21 (internal citation omitted).

<sup>29</sup> *See id.* at 24-26.

<sup>30</sup> *See id.*, Attachment E.

“the incentive and ability . . . to extend their networks to new locations in response to a request for even a single circuit.”<sup>31</sup> This blanket statement ignores the case-by-case analysis that a competitive LEC such as tw telecom must perform to determine whether constructing facilities to a particular customer location is economically feasible.<sup>32</sup> And while the Commission has found that competitive deployment of fiber to provide OCn services is economically feasible,<sup>33</sup> the Commission has not made such a finding with respect to competitive fiber deployment for the provision of all other non-TDM-based special access services. As the Commission has explained, substantial economic and operational barriers to competitive deployment of fiber facilities<sup>34</sup>—facilities which are used to provide non-TDM-based special access services—still

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<sup>31</sup> *Id.* at 20.

<sup>32</sup> See, e.g., Declaration of Scott Liestman on behalf of tw telecom inc. ¶ 5, *attached as* Attachment C to Opposition of Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp., WC Dkt. No. 09-135 (filed Sept. 21, 2009) (“Liestman Declaration”) (discussing the criteria that tw telecom uses to determine whether it will construct its own loop facilities to a given building in a metropolitan area, such as the Phoenix MSA); *see also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 150 (2005) (“*TRRO*”) (“The economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location.”). As tw telecom has explained, in order to justify construction of its own loop facilities, “the potential revenue [associated with a given building or a given customer] must be sufficient to cover the total cost of construction and recurring expenses and simultaneously achieve a reasonable rate of return on investment.” Liestman Declaration ¶ 5.

<sup>33</sup> See CenturyLink Petition at 22.

<sup>34</sup> See, e.g., *TRRO* ¶ 150 (“Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities”); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 85-91 (2003) (“*TRO*”) (subsequent history omitted) (discussing the relevant economic barriers to entry).

exist today.<sup>35</sup>

Moreover, while CenturyLink asserts that it “enjoys no advantage over” and faces the same costs as its competitors when deploying fiber,<sup>36</sup> this is simply not true.<sup>37</sup> For example, incumbent LECs have a number of first-mover advantages over competitors, including “preferential access to buildings, access to rights-of-way,” and other “operational difficulties faced by an entrant that have already been worked out by the incumbent LEC when it built out its network as a monopolist.”<sup>38</sup> In addition, in determining whether to self-deploy loops, competitors must account for the distance between the location and the competitive LEC’s nearest transport facilities<sup>39</sup> whereas incumbent LECs’ transport networks are ubiquitous.<sup>40</sup>

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<sup>35</sup> See *Phoenix Order* ¶ 90 (“We see nothing in the record to indicate that the passage of time [since the *TRO*] has lowered these barriers for competitive LECs that do not already have an extensive local network used to provide other services to enterprise locations today.”); *id.* ¶ 84 (“We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.”).

<sup>36</sup> See CenturyLink Petition at 29.

<sup>37</sup> See, e.g., Redacted Ex Parte Reply Comments of Telecom Transport Management, Inc., WT Dkt. No. 11-65, at 3-5 (filed June 21, 2011) (“Telecom Transport Management Comments”) (discussing the advantages that incumbent LECs possess in providing Ethernet backhaul services).

<sup>38</sup> *TRO* ¶ 89.

<sup>39</sup> See *TRRO* ¶ 154 (“[W]hen deciding whether and where to build their own facilities, competitive LECs target areas that offer the greatest demand for high-capacity offerings (*i.e.*, that maximize potential revenues) and that are close to their current fiber rings (*i.e.*, that minimize the costs of deployment).”).

<sup>40</sup> See Telecom Transport Management Comments at 3 (“Unlike competitors, the ILECs have dense ubiquitous networks and thus have a proximate presence near the cell site. Thus, the ILECs are typically required to extend their existing networks relatively short distances to serve cell sites. Competitors like [Telecom Transport Management], in contrast, rarely have existing facilities within proximity of the cell towers and instead must deploy new fiber rings to serve the wireless carrier and to deploy extensive infrastructure to the carrier’s cell sites.”).

CenturyLink further claims that “[w]here they choose not to deploy their own fiber facilities, potential providers also can rely on CenturyLink’s special access and UNE services to provide enterprise broadband services.”<sup>41</sup> But the Commission cannot logically make a finding that there is sufficient competition to warrant forbearance if that competition is based on CenturyLink’s own facilities. Moreover, if the Commission proceeds with the Technological Advisory Council’s recommendation to sunset the PSTN as of a date certain,<sup>42</sup> this option may be eliminated altogether.

*Fifth*, CenturyLink’s petition suffers from several other deficiencies. For example, CenturyLink cites recent price reductions for its enterprise broadband services in an attempt to demonstrate that legacy Embarq and legacy Qwest have been forced to respond to competing service offerings since receiving forbearance.<sup>43</sup> But falling prices are not necessarily evidence that a market is competitive.<sup>44</sup> As economists have explained, “[p]rices can change for a large number of reasons, *only one* of which is a change in competitive conditions.”<sup>45</sup> When marginal

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<sup>41</sup> CenturyLink Petition at 22.

<sup>42</sup> See generally Technological Advisory Council, Critical Legacy Transition Working Group, “Sun-setting the PSTN” (rel. Sept. 27, 2011), *available at* [http://transition.fcc.gov/oet/tac/tacdocs/meeting92711/Sun-Setting\\_the\\_PSTN\\_Paper\\_V03.docx](http://transition.fcc.gov/oet/tac/tacdocs/meeting92711/Sun-Setting_the_PSTN_Paper_V03.docx); Presentation, Technological Advisory Council, at 33-36 (Dec. 20, 2011), *available at* [http://transition.fcc.gov/oet/tac/tacdocs/Dec2011\\_mtg\\_full.ppt](http://transition.fcc.gov/oet/tac/tacdocs/Dec2011_mtg_full.ppt); see also Comments of AT&T, WC Dkt. Nos. 10-90 et al., at 49-50 (filed Feb. 24, 2012) (“[W]e are asking the Commission to declare the date on which, among other things, all such networks can no longer invoke regulatory interconnection rights and will bear full responsibility for the costs of continuing to use an obsolete circuit-switched technology while the rest of the communications ecosystem has converged onto a unified IP platform.”).

<sup>43</sup> See CenturyLink Petition at 4, 38.

<sup>44</sup> See Declaration of Dr. Stanley M. Besen ¶ 3, *attached as* Attachment B to Letter from Thomas Jones and Jonathan Lechter on behalf of tw telecom inc. to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dkt. No. 05-25 (filed July 9, 2009).

<sup>45</sup> *Id.* ¶ 8 (emphasis added).

costs decrease, for instance, “even monopolists will pass [a portion] of their cost savings on to consumers (not out of goodwill but in order to maximize profits.).”<sup>46</sup>

In its petition, CenturyLink also overstates the degree to which Ethernet-over-copper offerings present a competitive threat to its non-TDM-based special access services. As tw telecom and other competitive LECs have explained, there are significant obstacles to deploying Ethernet-over-copper services.<sup>47</sup> For instance, copper facilities are unavailable in many areas because the incumbent LEC has either retired or failed to maintain the underlying copper.<sup>48</sup> Additionally, when compared with Ethernet services offered over fiber facilities, Ethernet-over-copper services often provide significantly less bandwidth.<sup>49</sup>

Finally, CenturyLink claims that “[t]he sophistication of enterprise customers further reduces any need for dominant carrier regulation.”<sup>50</sup> According to CenturyLink, purchasers of its non-TDM-based special access services “are aware of the alternatives available to them . . . and they are adept at using those alternatives to obtain more favorable rates, terms and conditions in their negotiations with CenturyLink.”<sup>51</sup> But as enterprise customers have explained, as

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<sup>46</sup> See *id.* n.7 (quoting Oxford Economic Research Associates (OXERA), *Competing Ideas, Cost Pass-Through: What Constitutes a ‘Fair Share’?* at 1 (Jan. 2004)).

<sup>47</sup> See Comments of Cbeyond, Inc., Integra Telecom, Inc., Megapath, Inc., Covad Communications Company, and tw telecom inc., WC Dkt. No. 10-188, at 26-29 (filed Oct. 15, 2010).

<sup>48</sup> See *id.* at 26.

<sup>49</sup> For example, MegaPath’s Ethernet-over-copper service offers a maximum bandwidth of 45 Mbps. See MegaPath Ethernet, <http://www.megapath.com/data/ethernet/> (last visited Apr. 16, 2012). By contrast, legacy CenturyTel’s and legacy Embarq’s Ethernet Virtual Private Line services offer a maximum bandwidth of 10 Gbps, more than 200 times greater than MegaPath’s Ethernet-over-copper product. See CenturyLink Petition, Attachment A.

<sup>50</sup> CenturyLink Petition at 31.

<sup>51</sup> *Id.* at 20, 32.

sophisticated buyers, “they are also well aware of what choices are *not* available to them and generally have no way of obtaining suitable bottleneck special access facilities other than from the ILECs.”<sup>52</sup> In the absence of a viable alternative provider, there is nothing that even the most sophisticated customer can do to counteract CenturyLink’s market power.

#### **IV. CONCLUSION**

For the foregoing reasons, CenturyLink’s petition should be denied.

Respectfully submitted,

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<sup>52</sup> Brief of Private Petitioners, *Ad Hoc Telecomms. Users Comm. v. FCC*, No. 07-1426, at n.12 (D.C. Cir. July 15, 2008) (emphasis in original).